No. 18538

United States Court of Appeals
For the Ninth Circuit

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and LOCAL No. 6 of the United Steelworkers of America, AFL-CIO, *Appellants,*

vs.

NORTHWEST STEEL ROLLING MILLS, INC., a corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' BRIEF

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Appeal from the United States District Court for the Western District of Washington, Northern Division

APPELLANTS' BRIEF

JURISDICTION

This action was commenced by a Complaint seeking declaratory judgment enforcing an arbitrator's award under 28 U.S.C. 2201, it being alleged that there was an actual controversy existing between the parties; and that the jurisdiction of the District Court was based on 29 U.S.C. 185, commonly referred to as Section 301 of the Labor-Management Relations Act, the instant action being a suit for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in said law (R. 2).

Appellee moved for summary judgment (R. 17); the motion was heard on the pleadings and affidavits submitted (R. 2, 17, 18, 22, 36, 39, 80), and the District

Court granted summary judgment for the appellee (R. 90). Thereafter appellants filed timely notice of appeal (R. 99).

The jurisdiction of this Court is based upon 28 U.S.C. 1291 which vests jurisdiction of all appeals from final decisions of District Courts in the Courts of Appeal.

STATEMENT OF THE CASE

This is an appeal from a summary judgment denying an action for enforcement of an arbitration award.

The appellants are Unions representing, among others, some fifteen employees of the appellee company who filed grievances alleging that the Company violated its collective bargaining agreements by not assigning jobs in the reconverted mill to the grievants according to seniority (R. 42-79).

At the time of negotiation of the 1960-1962 agreement between the parties, the appellee company was in the process of beginning the installation of a new blooming mill and the reconversion of the finishing mill—converting to an automated plant. This would result in the elimination of several existing jobs. In a letter of agreement executed contemporaneously with the new contract (R. 8, pages 41 and 42), it was agreed that employees of the old mill would be given preference in manning the new mill, subject to Article IX of the basic agreement, which provides that where ability and physical fitness are relatively equal, seniority shall govern in all cases of promotion, increase or decrease of forces (R. 8, page 23).

When the new mill was manned, the grievances in-

volved herein were filed alleging that the company had violated Article IX of the agreement by not awarding to the grievants jobs to which they were entitled.

Article XI, Section 2, of the contract between the parties provides:

> "In the event that a grievance shall not have been satisfactorily settled by the Union and the Company, the case in question with all records pertaining thereto can then be appealed to an arbitrator to be appointed by mutual agreement of the parties hereto. The arbitrator shall render a decision in line with the written terms of the contract and said decision shall be final. . . ." (R. 8, page 28)

Said Article also contains, in Section 6, a "no strike" clause (R. 8, p. 28).

When the grievances were not satisfactorily settled, the grievants appealed them to arbitration and the parties agreed on Dr. Arthur Ross of the University of California as the arbitrator. Dr. Ross, on the day of his selection, agreed to serve only after being assured that the arbitration involved important problems of seniority in the face of automation (R. 26).

Two days prior to the arbitration hearing, counsel for the appellee company prepared a Stipulation to Arbitrate, which recited that the arbitration involved grievances, copies of which were attached to the stipulation, and which outlined five substantive questions under each of which some of the various grievances were categorized (R. 9, 10). The stipulation, with the grievances attached, was given to the arbitrator and read into the record by him at the beginning of the hearing. Also submitted at the beginning of the hearing was

the "Memorandum of United Steelworkers" which concluded: "It is for these reasons that the grievants seek an award requiring that they be placed in the new jobs in accordance with the agreements between the parties and that they be awarded back pay with interest." The appellant unions' opening statement concluded: ". . . we will ask that the men be given the jobs they are entitled to under the contract, and that they be awarded whatever damages are appropriate" (R. 28).

The arbitration hearing lasted, with recesses, from 9:00 A.M., until almost 9:00 P.M. Fifteen witnesses testified, twelve exhibits were received, and the arbitrator viewed the steel mill, reviewing the various operations involved in the disputed jobs. A 268-page transcript of the hearing was prepared by a court reporter (R. 4, 95, 96). Two months after the hearing, the arbitrator returned to Seattle where he orally announced his decision that the appellee company had violated the contract in all particulars. Dr. Ross stated that he could either proceed to formulate an award—granting jobs, indemnification, setting up testing procedures, etc.—, or he could allow the parties to first suggest an agreed formula for filling the jobs. The parties agreed to attempt to assist the arbitrator in formulating an award, negotiated with each other for two months, communicating with the arbitrator as to their progress, but were unable to reach an agreement and finally requested the arbitrator to formulate his own award (R. 13, 26, 80, 81).

On September 26, 1962, Dr. Ross handed down his decision and award in which he reiterated his oral pro-

nouncement that the appellee company had violated the contract in filling the jobs involved in the grievances, and in which he placed some of the grievants on the disputed jobs for try-out, retaining jurisdiction in the event that the men proved unsatisfactory (R. 11-16). Other grievants were given nothing under the award, the jobs they sought being filled with other grievants or employees having greater seniority, ability or fitness. Two grievants were directed to be pensioned, Rhodes having reached compulsory retirement and pension age before the award was announced, and Schillen who would reach such age within six months. Both of these men have been pensioned by the appellee company and this portion of the arbitrator's award is now moot. In addition to the foregoing Dr. Ross directed payment of lost wages to four grievants.

The appellee company filed a Motion for Reconsideration and Revision of Decision, asking the arbitrator to change certain specific portions of his award which appellee contended were job assignments in the finishing mill, while they should have been only try-outs for the jobs (R. 33-35). Appellee did not question nor seek changes in the other portions of the arbitrator's award which dealt with the blooming mill (R. 26, 27).

Subsequently the appellee company refused to carry out the terms of the arbitration award and, on October 26, 1962, appellants filed this action for enforcement of the award (R. 2-16). Appellee moved for summary judgment stating that the arbitrator had exceeded his authority by doing more than answering affirmatively or negatively the five questions in the Stipulation to Arbitrate (R. 17-21). Appellants moved to amend the

complaint by attaching the individual grievances to the Stipulation to Arbitrate (R. 39-79). The motion was granted.

The motion for summary judgment was heard on the pleadings and the affidavits of counsel. The Affidavit of John D. Spellman in Opposition to Defendant's Motion for Summary Judgment (R. 22-35) stated that at no time prior to filing its motion for summary judgment did the appellee company argue, plead or intimate that the arbitrator's authority was limited to merely answering five questions "yes" or "no" and not to entering an award settling the grievances. It further stated that the parties did not intend to so limit the arbitration, but, on the contrary, the parties intended that the arbitrator would arbitrate the grievances as provided by Article XI, Section 2 of the contract (R. 23). The affidavit stated that the Stipulation to Arbitrate was intended to be a general outline of the categories in which the several different groups of grievances fell, and cited portions of the arbitration hearing transcript and pleadings which allegedly show that the parties at all times intended and authorized the arbitrator to award jobs and try-outs, if he found the appellee company had violated the contract in its job selections (R. 24-26) This affidavit contends that the Stipulation to Arbitrate was superfluous under the contract's arbitration procedure, and even had the appellee company initially intended to attempt to restrict the arbitrator to merely answering questions, it had waived its right to so insist (R. 23, 26, 27). The affidavit stated that the contract provides for arbitration of the grievances themselves, and that the arbitrator's award was

based upon the grievances themselves in line with the written terms of the contract, and therefore final (R. 27).

Counsel for appellee company filed a reply affidavit on the morning or the hearing on the motion for summary judgment (R. 80). This affidavit denied that the parties intended to have the arbitrator make an award based on the grievances, denied that appellee had waived the right to so insist, and denied that the Stipulation to Arbitrate was intended to be only an outline of the issues (R. 81, 82, 83).

After oral argument based on the pleadings and affidavits, the court issued its Memorandum Decision (R. 87-89) in which it stated that the parties did not submit the grievances to arbitration pursuant to the specific terms of Article XI, Section 2, of the basic labor agreement (R. 87), but instead entered into a stipulation which limited the arbitrator's powers solely to giving an affirmative or negative answer to the five questions posed therein (R. 88, 89). The court found that the arbtrator had found that the appellee company had violated the contract with regard to each question submitted to him, but that all portions of his award in addition to those findings were in excess of the arbitrator's authority and therefore invalid and unenforceable (R. 89).

The court entered an order granting the motion for summary judgment (R. 90) and subsequently denied appellants' motion for new trial (R. 91, 93, 98).

SPECIFICATION OF ERRORS

1. The District Court erred in granting a Summary Judgment for Appellee.

2. The District Court erred in finding that the arbitrator had no power or authority to do anything except give an affirmative or negative answer to the five questions posed in the Stipulation to Arbitrate, said finding appearing in the Order Granting Defendant's Motion for Summary Judgment and reading:

> "It is ORDERED, ADJUDGED and DECREED that the arbitrator had no power or authority to do anything except to give an affirmative or negative answer to the five questions posed in the Stipulation to Arbitrate set forth in full in this arbitrator's decision which is Exhibit C to the complaint herein...." (R. 90)

3. The District Court erred in making the following findings:

> "The decision of the arbitrator did give an affirmative answer to all five questions set forth in said stipulation. Any finding or award of the arbitrator in addition thereto was in excess of the authority extended to him and is invalid and unenforceable." (R. 90)

4. The District Court erred in not finding that there was a genuine issue concerning material facts.

5. The District Court erred as a matter of law in not finding that the arbitrator's award was within the scope of the arbitrator's power under the collective bargaining agreement, was in line with the written terms thereof, and final and enforceable.

6. The District Court erred in finding that the griev-

ances herein were not submitted to the arbitrator, said finding reading:

> "The parties did not submit the grievances to arbitration pursuant to the specific terms of the aforesaid provision of their labor agreement but prepared and signed a written stipulation to arbitrate dated March 13, 1962." (R. 87)

7. The District Court erred in not granting appellants' motion for new trial (R. 98).

8. The District Court should be directed to enter a judgment enforcing the arbitrator's award in its entirety.

SUMMARY OF ARGUMENT

This appeal is based upon two contentions: First, that the trial court erred as a matter of law in finding that the arbitrator's award was in excess of his authority, and Second, that the trial court erred in granting summary judgment since there existed genuine issues of material fact.

These basic contentions are discussed under the following headings:

I. The court erred as a matter of law in finding that the arbitrator's award exceeded the scope of his authority.

   A. The arbitrator's authority was based upon the collective bargaining agreement, not the stipulation to arbitrate.

      1. The contract requires the submission of unsettled grievances to the arbitrator.

      2. The stipulation to arbitrate was merely an outline of substantive issues involved in the arbitration.

B. The arbitrator's award, deciding the grievances in line with the written terms of the contract, is final.

C. The court, violating federal policy, substituted its contract interpretation for that of the arbitrator.

II. Assuming the lower court not to have erred as a matter of law in finding that the contract was superseded by the stipulation to arbitrate, issues of material fact existed preventing summary judgment.

A. An issue existed as to whether the parties intended the stipulation to arbitrate to limit the arbitrator's contractual authority.

1. The contract, grievances and stipulation, read together, create an issue of fact.

2. Contemporaneous documents and statements of the parties raise an issue of fact.

B. An issue existed as to whether appellee waived any right to restrict the arbitrator's authority.

ARGUMENT

Upon an appeal from an order granting summary judgment it is proper to consider whether there was a genuine issue of material fact and whether the substantive law was correctly applied, *Koepke v. Fontecchia,* 177 F.2d 125 (9th Cir.—1949); Moore's Federal Practice, 2d Edition, s. 56.27 (1), p. 2364.

Appellants will address themselves to the lower court's errors in substantive law first, contending that the court erred as a matter of law. If appellants' position is correct as a matter of law, there would be no point in trying this case and appellants could proceed to move for summary judgment.

I.

The Court Erred as a Matter of Law in Finding that the Arbitrator's Award Exceeded the Scope of His Authority

The trial court found that the arbitrator exceeded his authority by doing more than answering five questions affirmatively or negatively, and ruled that all portions of the arbitrator's award which did more than answer the five questions were invalid and unenforceable (R. 90). This decision was based solely on the court's finding that the arbitrator's authority was restricted to the questions presented in the Stipulation to Arbitrate (R. 87-89). Appellants contend: (A) that the arbitrator's authority was based upon the contract between the parties, not the stipulation; (B) that in deciding the grievances in line with the written terms of the contract, the award was final and binding; and (C) that the court violated Federal Policy in striking down the arbitrator's award.

A. The Arbitrator's Authority Was Based Upon the Collective Bargaining Agreement, Not the Stipulation to Arbitrate

The method of adjustment of grievances between the parties has long been established. Article XI of the 1960-1962 collective bargaining agreement between the parties (R. 8, pages 26-29), in the same language which had been in preceding contracts, spells out the sole method of settling grievances.

1. The Contract Requires the Submission of Unsettled Grievances to the Arbitrator

Article XI of the contract, after providing machinery for settlement of grievances at various levels, provides in Section 2, as follows:

> "*Section* 2. In the event that a *grievance* shall not have been satisfactorily settled by the Union and the Company, *the case in question with all records pertaining thereto can then be appealed to an arbitrator* to be appointed by mutual agreement of the parties hereto. *The arbitrator shall render a decision in line with the written terms of the contract* and said decision shall be final . . ." (R. 8, page 28, emphasis supplied)

It seems clear that the parties have agreed, as the result of negotiation, that, when arbitration is necessary, the grievance, itself, with all pertinent records is *appealed* to the arbitrator. The use of the word "appealed" is significant here since it implies something more than submitting a specific question to the arbitrator. Black's Law Dictionary, 3d Edition, p. 123 (1933), gives the following definition:

> "APPEALED. In a sense not strictly technical, this word may be used to signify the exercise by a party of the right to remove a litigation from one forum to another . . ."
>
> "APPEAL . . . An 'appeal' in equity is a trial *de novo* . . ."

The case in question, the unsettled grievance with all pertinent records, is appealed to the arbitrator for his decision. Appeal to the arbitrator, as in the case of other appeals, can be, and usually is made by only one party. Arbitration, being in the nature of an equitable proceeding, proceeds to a *de novo* hearing in order to settle the unsettled grievance. Article XI, Section 2, specifically states that the arbitrator's decision shall be final, implying that the intent of the parties and the duty of the arbitrator is to supply a final settlement of

the grievance. There is no contractual provision for piecemeal decision of portions of the grievance without reaching a final disposition.

2. The Stipulation to Arbitrate Was Merely an Outline of Substantive Issues Involved in the Arbitration

Bearing in mind the contractual provisions for arbitration, it is apparent that the Stipulation to Arbitrate dated March 13, 1962 (R. 40-79), was nothing more than an outline of the substantive issues involved in the arbitration. The very first sentence of the stipulation states: "The matters submitted for arbitration involve the 'Grievances,' copies of which are attached hereto" (R. 40). Nineteen individual grievances were attached to the stipulation (R. 42-79). They varied not only in form, but also in subject matter and in the jobs involved.

A glance at the nineteen grievances submitted to Arbitrator Ross shows they involve fifteen different men contesting various job assignments in two different mills (R. 42-79); four of the men contesting assignments in each of the mills (R. 42, 44, 58, 60, 70, 72, 74, 78). Some of the grievances claim a failure to have a try-out on a job (R. 42-49, 58-79), some claim an inadequate try-out (R. 50-57), some claim a failure to be assigned a specific job (R. 42-63), some claim a failure to be assigned any job (R. 64-79), and all claim violations of the contract provisions involving seniority, fitness and ability.

This multiplicity of grievances to be presented to an arbitrator, unfamiliar with the individual grievances until the date of the hearing, clearly called for an out-

line of the basic categories into which the various grievances could be divided. On its face, the Stipulation to Arbitrate (R. 40-79) divides the grievances into categories and presents the basic substantive issue under which each category of grievances comes. The first question outlined in the Stipulation reads:

> "1. Did the company violate the Agreement of the parties dated July 7, 1960, (hereinafter referred to as the 'Basic Agreement') in not selecting A. H. Garrioch, Earl Stockman, Charles V. Ward, and Wesley Miller to try out for positions in the Blooming Mill operated by the company, *as claimed in the Grievances of said men attached hereto.*" (R. 40, emphasis supplied)

Each of the following three questions concludes with the identical language underlined in Question 1, to-wit: ". . . as claimed in the Grievances of said men attached hereto."

Not only did the Stipulation open with a sentence acknowledging that the matters submitted involve the attached *grievances,* but also, each of the four substantive questions set forth in the Stipulation referred back to the *grievances* themselves.

That the March 13 Stipulation was only an outline of substantive issues is further borne out by the Stipulation of the same parties dated February 16, 1962 (R. 29-32), which was entered into at the time of dismissal of a Superior Court suit to compel arbitration. The February 16 Stipulation has attached to it a letter outlining pending grievances. Section I of the Stipulation states:

> "I. It is agreed that the separate matters in-

volved in paragraphs I (a), (b) and (c) and 6 (a) of said letter shall be submitted to Mr. Arthur Ross for arbitration by him." (R. 29)

The paragraphs of the letter referred to read as follows:

"1. The grievances filed in three (3) groups, which were appealed, were as follows:

"(a) June 19, 1961, pertaining to *Job Placement by Seniority* for A. M. Garrioch, Frank Nichols, Earl Stockman, Charles Ward and Wesley Miller in the Blooming Mill Division;

"(b) June 22, 1961, pertaining to *Job Placement by Seniority and Application* for John Christian, Robert DeLong, George Isaacson and Jack Flynn to position applied for;

"(c) June 28, 1961, for Ed Stockman, Henry Lee Day and Everett Wright to fill newly created job of *Pusher Operator in Blooming Mill Division.*

. . .

"6. Grievances for *Positions of the Rolling Mill Division,* filed on the 15th, 18th and 19th of January, 1962, and answered by H. J. Stack on January 22 and 24, 1962, please be advised as follows:

" '(a) The Union wishes to appeal to arbitration (Article XI, Section 1) the grievances of M. Hughes, A. Garrioch, C. Ward, H. Schellen, A. Rhodes, C. Wogenson, P. Perfrement, M. Daniels, *Rolling Mill Division;* and E. W. Stockman and H. L. Day on the *Heating Division.*' " (R. 30, 31)

Again it will be noted that what were to be submitted Arbitrator Ross were the grievances outlined in the letter attached to the February 16 Stipulation. Section IV of that Stipulation provides: "Separate arbitration stipulations shall be submitted to each of the above

named arbitrators listing the *issues* to be considered and determined by them *as set forth above''* (R. 29, emphasis supplied). These statements from the February 16 Stipulation make clear what was the intent of the parties in later outlining the issues for the arbitrator in the March 13 Stipulation. There was no intent to supersede the contractual provisions dealing with arbitration, nor the grievances. The March 13 Stipulation was merely an outline of substantive issues involved in the arbitration.

B. The Arbitrator's Award, Deciding the Grievances in Line with the Written Terms of the Contract, Is Final

Article XI, Section 2, of the contract provides: ''The arbitrator shall render a decision in line with the written terms of the contract and said decision shall be final'' (R. 8, page 28).

Under the grievances involved herein, the primarily relevant written terms of the contract are those on ''Seniority'' set forth in Article IX, Section 1:

> ''It is understood and agreed that in all cases of promotion or increase or decrease of forces, the following factors shall be considered, and where factors 'b' and 'c' are relatively equal, the length of continuous service shall govern:
>
> ''(a) Continuous service
>
> ''(b) Ability to perform the work
>
> ''(c) Physical fitness.'' (R. 8, page 23)

Each grievance claimed that the employee's right under Article IX of the contract had been violated, and the appellee company's answer in most cases was that the employee's physical fitness and ability to perform

the work were not relatively equal to those selected (R. 42-79).

Arbitrator Ross found that the appellee company violated the seniority provisions of the contract in the selection of men for try-outs and for positions in the Blooming Mill and Finishing Mill (R. 14) and proceeded to formulate an award in accordance with those provisions.

Sections 1 and 2 of the award (R. 14) provide for pensioning of A. E. Rhodes immediately and H. H. Schillen in March, 1963, each of said men having reached compulsory retirement and pension age at the times mentioned. Surely, there could be no point in placing Mr. Schillen on one of the new jobs for training for the few months after the arbitrator's award and prior to his retirement; and the appellee company did not object to this portion of the arbitrator's award (R. 33-35). Both Rhodes and Schillen have been pensioned by the appellee and, therefore, the first two sections of the award are now moot.

Sections 3, 4 and 10 of the award merely approve job assignments made by the appellee company, finding them to be in accord with Article IX of the contract (R. 15, 16).

Section 5 of the award, in effect, provides try-outs for two senior grievants on specific jobs in the Finishing Mill, based on the ability and fitness; the arbitrator retaining jurisdiction in the event said men prove unsatisfactory; and Section 6 provides a similar try-out for a grievant, senior to the company's selectee for the position of Blooming Mill Operator, said grievant, ac-

cording to one of the tests given, having scored the highest in ability and fitness for said position (R. 15).

Section 7 of the award provides a try-out as Furnace Operator, the arbitrator retaining jurisdiction if the grievant proves unsatisfactory; and Sections 8 and 9 transfer men, previously selected for disputed jobs by the appellee company, and displaced by the arbitrator's award, to positions to which they are entitled over other grievants, because of seniority (R. 16).

Section 11 of the award dismisses the grievances of men with less seniority, ability or fitness than those awarded job try-outs (R. 16).

The final section of the award, Section 12, provides six months' back pay, diminished by unemployment compensation, supplementary unemployment benefits or earnings, to the four grievants who were wrongfully denied try-outs or jobs in the new mill and who are given such try-outs under the award (R. 16).

Each section of the award is in line with the written terms of the contract and combined they settle all of the grievances submitted for arbitration. In its request for reconsideration, the appellee company in no way challenged Sections 1, 2, 6, 8, 9, 11 or 12 of the award (R. 33-35).

Such objections as the appellee company did make were based on the ground that Finishing Mill selections could only be made on the basis of try-out, not assignment, there being no hint that the arbitrator had no power to award try-outs in that mill (R. 33-35). The grievances, however, speak for themselves and there

can be no doubt but that the arbitrator's award was a valid decision based on the grievances.

Since the parties, by collective bargaining, agreed that the arbitrator's decision, in line with the written terms of the contract, should be final, and, in reliance upon this, the Union agreed not to strike during the life of the contract, it follows that the appellee company should now be bound by Arbitrator Ross' award.

C. The Court, Violating Federal Policy, Substituted Its Contract Interpretation for that of the Arbitrator

"The present federal policy is to promote industrial stabilization through the collective bargaining agreement. . . . A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578 (1960).

The *Warrior & Gulf* case *(supra)* discusses in detail the federal policy relating to labor arbitration, pointing out that arbitration under the collective bargaining agreement is a form of self-government, a part of the continuous collective bargaining process, which, rather than a strike, is the terminal point of disagreement between the parties (page 581). Further, the court discusses the arbitrator's unique qualifications for solving the grievances, qualifications involving an application of industrial common law—the practices of the industry and the shop—and of considerations not expressed in the contract (page 582). Dealing specifically with the problem of courts finding certain grievances beyond the scope of arbitration, the Supreme Court said:

> "In the absence of any express provision excluding a particular grievance from arbitration, we think *only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail,* particularly where, as here, the exclusion clause is vague and the arbitration clause is quite broad. Since *any attempt by a court to infer such purpose necessarily comprehends the merits,* the court should view with suspicion any attempt to persuade it to become entangled in the substantive provisions of a labor agreement, even through the back door of interpretating the arbitration clause, when the alternative is to utilize the services of an arbitrator." *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.W. 574, 584-585 (1960) (emphasis supplied).

The parties to a collective bargaining agreement do not bargain to have a court tell them what was their purpose in entering the arbitration clause of their agreement. This is clearly a prerogative of the arbitrator. Here, the parties did not agree to allow a court to interpret the arbitration clause and the supplementary stipulation to determine the parties' purpose, they agreed to be bound by the arbitrator's decision on these matters.

The lower court, in granting summary judgment, struck down all of the relief granted the individual grievants by the arbitrator. It substituted its interpretation of the arbitration provisions of the contract, its conclusions on the merits, and its determination as to the intent of the parties, for those of the experienced arbitrator, whom the parties had bargained should solve their grievances. Such conduct seems clearly violative of the following strong rules laid down for labor

arbitration cases in *United Steelworkers v. Enterprise Corporation,* 363 U.S. 593 (1960):

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the award. As we stated in *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 . . ., decided this day, the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.
>
> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There is the need for flexibility in meeting a wide variety of situations . . . " (pages 596-597) " . . . the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." (page 599)

It must be borne in mind that, in exchange for the contractual guarantees of solution of all grievances through the arbitrational process, the appellant unions

and their members gave up the right to strike during the duration of the contract (R. 8, pages 27, 28). The Supreme Court has attached so much importance to this "no strike" feature of arbitration agreements that in the recent case of *Teamsters Union v. Lucas Flour Co.,* 369 U.S. 95 (1962) it found that, although there was no "no strike" clause in the contract, "The grievance over which the union struck was, as it concedes, one which it had expressly agreed to settle by submission to final and binding arbitration proceedings" and the union was liable for damages since it breached an *implied* no strike clause. The unions here, having given up the right to strike in exchange for the contract's arbitration provisions, cannot be assumed to have, for no consideration, waived the right to have a solution of these vital grievances. [See *Independent Soap Workers v. Procter & Gamble Manufacturing Co.,* 314 F.2d 38, 42 (9th Cir.—1963).]

If "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail," *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 585 (1960), the trial court surely erred in finding in the instant case a purpose to exclude the power to make any remedy from the arbitrator's authority. An award finding that the appellee company had violated the contract in all respects, but which was unable to provide any remedy for the grievants would be a bitter Pyrrhic victory for the men who had lost their jobs and their seniority. Such a hollow award would not contribute to industrial peace, but by allowing the company, which had violated the contract, to proceed at its own pleasure, would leave the parties in more bitter in-

dustrial strife than they were in when the original grievances were filed fifteen months before.

The public policy of the United States, as voiced in recent Supreme Court opinions, was clearly violated by the trial court in usurping the role of the arbitrator.

II.

Assuming the Lower Court Not to Have Erred as a Matter of Law in Finding that the Contract Was Superseded by the Stipulation to Arbitrate, Issues of Material Fact Existed Preventing Summary Judment

In the preceding section of this brief appellants have argued that the moving party, the appellee company, as a matter of law was not entitled to judgment. On the contrary, appellants contend that, as a matter of law, the arbitration provisions of the collective bargaining agreement control and the arbitrator's award thereunder is final and binding. If this is, in fact, the case there would be no issues of material fact, and there would be no need to proceed with the following section of this brief.

Assuming *arguendo,* however, that the lower court was correct in finding that the contract's arbitration provisions (R. 8, page 28) were not governing as a matter of law, appellants contend that there were genuine issues of material fact relating to whether the Stipulation of March 13, 1962 (R. 40-79) superseded the contractual provisions. This section of appellants' brief is devoted to discussion of those issues, based on the lower court's conclusions of law.

Under Rule 56 (c) of the Federal Rules of Civil Procedure, a summary judgment can be granted only "if

the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

In *Byrnes v. Mutual Life Insurance Company of New York,* 217 F.2d 497 (9th Cir.—1954), this Court described the object of Rule 56, as follows:

> "The object of the procedure for summary judgment is not to *determine* an issue, but whether *there is an issue* to be tried . . .
>
> "Against the summary disposition of an issue stands the fundamental right to trial in open court by adversary proceedings, and through the testimony adduced therein on the issues tendered. The late Judge Cardozo has stated in simple, yet classic language, the condition which justifies a departure, under summary judgment, from this principle:
>
> " 'To justify a departure from that course and the award of summary relief, the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried.' *Curry v. MacKenzie,* 1925, 239 N.Y. 267, 270 . . ." (page 500).

A. An Issue Existed as to Whether the Parties Intended the Stipulation to Arbitrate to Limit the Arbitrator's Contractual Authority

Appellants contend that, at the very least, an issue existed regarding the parties' intent in making the Stipulation of March 13, 1962; and that (1) the documents themselves and (2) the contemporaneous documents and statements of the parties, bear out the existence of a genuine issue of material fact.

1. The Contract, Grievances and Stipulation, Read Together, Create an Issue of Fact

The collective bargaining agreement, on its face, gives rise to an issue as to whether the parties intended that there be any method of settling grievances not set forth therein. Article XI, "Adjustment of Grievances," reads:

> "*Section 1.* Should any differences arise between the Company and the Union, or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or as to any question relating to wages, hours of work and other conditions of employment of any employee, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle them promptly and in accordance with the provisions of this Agreement in the following manner:
>
> " . . . Third: In the event the dispute shall not have been satisfactorily settled the matter shall be submitted to arbitration under Section 2 of this Article.
>
> "*Section 2.* In the event that a grievance shall not have been satisfactorily settled by the Union and the Company, the case in question with all records pertaining thereto can then be appealed to an arbitrator to be appointed by mutual agreement of the parties hereto. The arbitrator shall render a decision in line with the written terms of the contract and said decision shall be final. . . .
>
> "*Section 6.* During the term of this Agreement, neither the Union nor its agents nor its members will authorize, instigate, aid, condone or engage in any work stoppage or strike. . . . " (R. 8, pages 26-28)

The contract provides that *any* differences shall be settled in this specific way, that there shall be no suspension of work, or strike, but that the parties shall proceed to settle the dispute *in accordance with the provisions of the Agreement.* These provisions, arrived at through the give and take deliberations of collective bargaining, should not be assumed to have been lightly set aside by a spur of the moment stipulation of counsel, unnecessary under the contract, not subjected to negotiation, totally without consideration, and which on its face would not solve the problems raised by the grievances (R. 23, 24).

The very grievances attached to the stipulation ask specific relief, not mere "yes" and "no" answers. They contain various requests for relief, among them the following: "Therefore, I request that I be given equal opportunity to learn the job mentioned above" (R. 42-49); "Therefore, I ask that I be given the job of Pusher Operator" (R. 58-63); and "Therefore, I ask the Company to reconsider their action and grant me a position which I am entitled to under the terms of the agreement. I also ask to be reimbursed for any losses I may have suffered due to their action" (R. 64-79).

The Stipulation to Arbitrate (R. 40), dated March 13, 1962, after the appeal of the grievances to arbitration and the selection of an arbitrator (R. 23, 24), does not purport to rescind or supersede the procedure for arbitration set forth in Article XI, Section 2, of the contract. It refers repeatedly to the basic agreement and to the specific grievances, embracing them rather than excluding them. Certainly, it recites "questions" under which the various grievances can be separated,

but always referring to the basic agreement and concluding "as claimed in the Grievances of said men attached hereto."

Reading the contract, the grievances and the Stipulation and giving meaning to each, it cannot be clearly stated that the parties intended to proceed to an arbitration which would only answer affirmatively or negatively the five questions set forth in the Stipulation. At the very least, it might be said that the intent of the parties was ambiguous and a factual issue existed in that regard.

2. Contemporaneous Documents and Statements of the Parties Raise an Issue of Fact

As pointed out at pages 14 and 15 of this brief, even before the Stipulation of March 13, 1962, was entered, the parties agreed to submit the grievances, outlined in the January 30, 1962, letter, to Arbitrator Ross. In this earlier Stipulation, the parties agreed to list the issues "as set forth above" for the arbitrator's decision. The issues "as set forth above" were the various grievances as divided into categories in the letter of January 30 (R. 29-32). This document supports the proposition that the parties intended to submit the grievances to the arbitrator together with an outline of their contents.

The Memorandum of the United Steelworkers (R. 24), drafted contemporaneously with the March 13 stipulation and served and filed at the same time as the stipulation was presented to the arbitrator, concludes:

> "Most of the employees with top seniority have been off the job in enforced lay off status since

> September, 1961. Their work for the Company will be at an end, due to automation and the Company's refusal to place them in the new jobs, unless they are placed in these new positions. Their years of accumulated seniority and pension benefits will be abandoned if they are not returned to the job. These are the very reasons why seniority agreements exist in contracts and why seniority must be protected by arbitrators, absent the clearest showing by the Company that the man does not have relative ability to perform the work.
>
> "It is for these reasons that *the grievants seek an award requiring that they be placed in the new jobs in accordance with the agreements between the parties and that they be awarded back pay with interest.*" (R. 24, 25, emphasis supplied)

In concluding his opening statement on behalf of the appellants at the arbitration hearing, counsel stated: " . . . we will ask that the men be given the jobs that they are entitled to under the contract, and that they be awarded whatever damages are appropriate" (R. 25).

At the close of the arbitration hearing, counsel for the appellee company stated in his concluding remarks: " . . . the details become quite important, because we would be committed to the men as finally growing directly or indirectly out of this arbitration" (R. 25, 26).

These documents and statements indicate a factual issue regarding the parties' intent as to the extent of the arbitrator's authority. So does the letter of agreement between the parties dated April 24, 1962, about a month after the hearing and before there was any intimation of what that arbitrator's decision would be. The letter confirms an agreement:

> " . . . that the grievances of the following employees regarding the selection of employees for new positions in the Finishing Mill shall be held in abeyance without prejudice to the position of either party until receipt of the decision of Arbitrator Ross in the matter of selection of employees for the Blooming Mill positions." (R. 86)

It is reasonable to assume that parties here were agreeing that they would hold certain other grievances in abeyance until Arbitrator Ross either found that the men selected by the company for the Blooming Mill positions were proper under the contract, or selected other men for those positions. If the parties did not intend the arbitrator to select the proper men for the positions in the event he found a contract violation, there would be no purpose in waiting to see what positions had been filled by the arbitrator. An issue of fact as to the parties' intent would certainly arise.

The fact that at no time prior to court action for enforcement did the appellee company even intimate that the arbitrator's power was limited to answering the stipulation's questions "yes" or "no," and that counsel for the appellee stated that the grievances would be attached to the stipulation and that the stipulation would serve merely as a general outline of the categories in which the several different grievances fell (R. 24), certainly raise genuine issues of material fact as to the intent of the parties.

The trial court was not free to weigh the evidence presented in the affidavits and decide the issues. On the motion for summary judgment, it was not to engage in trial by affidavit, but was required to treat the alle-

gations of the non-moving party, the appellant unions, as true, *Guinn Company v. Mazza,* 296 F.2d 441 (D.C. Cir.—1961). The trial court was not permitted to make a choice of inferences to be drawn from facts contained in the affidavits. "On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion," *United States v. Diebold,* 369 U.S. 654 (1962). In deciding that there was no issue of material fact regarding the intent of the parties, the trial court disregarded these basic rules of summary judgment procedure.

B. An Issue Existed as to Whether Appellee Had Waived Any Right to Restrict the Arbitrator's Authority

The appellee company in the face of pleadings, evidence, arguments and conferences, all directed to providing the arbitrator with the knowledge necessary to place the grievants on the disputed jobs, if he found they were entitled to them under the terms of the contract, at no time objected, corrected or contended that the arbitrator could only give "yes" and "no" answers and could not shape a remedy to solve the grievances (R. 22-28). This contention was only made after the decision and award had been entered and this court action was begun to enforce the award.

Certainly, the appellee company could not lay back and gamble on the decisions of the arbitrator and the job selections made therein, and, only then, dissatisfied with the result, raise contentions on which it had been deceptively silent. Such conduct is similar to withhold-

ing objections until after a verdict, which is improper and prejudicial, *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 239 (1939). Appellee waived the right to attempt to limit the arbitrator to answering the questions in the stipulation, and was estopped from raising the issue in the trial court. *Kreindler v. Judy Bond, Inc.,* 234 N.Y.S.2d 380, 382 (1962).

The silent acquiescence leading up to waiver began with the appellant unions' opinion brief and statement at the hearing, both of which requested that the arbitrator place the grievants on jobs (R. 24, 25). It continued throughout the hearing (R. 26). Four months after the hearing and two months before the award was issued, Arbitrator Ross announced his finding that the appellee company had violated the contract in filling the disputed jobs. At that time he gave the parties the option of allowing him to make an award placing grievants on disputed jobs, giving indemnification and otherwise disposing of the grievances, or of assisting him in making such an award (R. 13, 26, 96). Appellee company not only did not protest that the arbitrator had no authority to do more than answer the five questions "yes" or "no," which he had already done, but agreed to attempt to assist the arbitrator in formulating the award (R. 13, 26).

Even after the attempts to assist the arbitrator had failed, and he had issued his award, appellee company did not protest that he had no authority to place grievants on various jobs or give lost wages. In its motion for reconsideration, it merely raised specific arguments as to why the arbitrator's award regarding the Finish-

ing Mill was believed beyond the scope of the grievances (R. 36, 38).

Appellee company's conduct at the hearing and after, both before and after the award, viewed in the light most favorable to appellants, clearly points to a waiver of any right to limit the arbitrator's authority to the questions set forth in the stipulation.

CONCLUSION

This brief has been written in the belief that the trial court erred as a matter of law in finding that the arbitrator's authority was limited solely to answering five specific questions, and that he had no power to grant remedies required in the grievances.

Appellants contend that it is clear that summary judgment was improper herein, but have dwelt at length with the court's errors of law, because they feel certain that if they are correct as a matter of law, there would be no point in trying this case.

Appellants pray that the court reverse the court's errors which are matters of law and order judgment for appellants, or a hearing on the issue involved.

Respectfully submitted,

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